

STATE OF NORTH CAROLINA  
COUNTY OF BUNCOMBE

IN THE OFFICE OF  
ADMINISTRATIVE HEARINGS  
10 EDC 6587

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*Mother et al,* )  
 )  
Petitioner, )  
 )  
v. )  
 )  
Buncombe County Schools, )  
 )  
Respondent. )

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**FINAL DECISION  
ORDER OF DISMISSAL**

**THIS MATTER** comes before the undersigned Administrative Law Judge, on Respondent's Objection to the Sufficiency of the Petition and Motion to Dismiss filed on October 29, 2010. After reviewing Respondent's Objection and all papers submitted by Petitioner, and the Petition and all other documents in the file, the Undersigned finds as follows:

1. Petitioner has filed three contested cases at the Office of Administrative Hearing within a three week period between October 18, 2010 and November 8, 2010. Petitioner has previously filed three other Petitions for Contested Case Hearing.

2. In 2008, the Petitioner filed her first Petition for Due Process, 08 EDC 2971 (Due Process No. 1). That matter came on for hearing for two days in May 2009 and two days in June 2009. At the hearing, the Honorable Selina Brooks granted the Respondent Board of Education's Motion for Directed Verdict after three and a half days of testimony. Judge Brooks upheld the Board's placement and when the Judge issued her signed order in August 2009, the Respondent reassigned the student to the separate setting per the student's Individualized Education Program (IEP). This reassignment, however, was prior to school starting. Upon filing her appeal, the Respondent placed the student in the "stay put" setting (resource setting). On October 12, 2009, the State Department of Public Instruction's State Review Officer upheld Judge Brooks' Decision in Due Process No. 1.

3. A second due process was filed on August 24, 2009; 09 EDC 4879 (Due Process No. 2). That matter concerned, *inter alia*, the student's assignment to XY Elementary School. In September 2009, the Office of Administrative Hearings dismissed Due Process No. 2 based on the doctrine of *res judicata* and because the Petitioner failed to provide a sufficient Petition.

4. In December 2009, the Petitioner filed a lawsuit appealing Due Process No. 1 and No. 2 in federal court. The District Court dismissed the lawsuit in regards to *Mother* as well as *Student*. The Petitioner appealed this decision to the Fourth Circuit Court of Appeals, which is still pending. During the appeal to federal court, the child remains in her stay put setting.

5. In January/February 2010, the Petitioner filed a third due process, which she later voluntarily dismissed (Due Process No. 3).

6. Petitioners filed for this present contested case hearing on October 18, 2009 on an Office of Administrative Hearings' form checking the blocks disputing the educational placement of the child and alleging the child has been denied a free, appropriate public education. Petitioner cites as fact(s) supporting her Petition that in the "2010-2011 school year" her daughter "was excluded from ABC Elementary School (ABC) her stay put/pendency educational placement while in the midst of judicial proceedings of a 11/24/08 Due Process Complaint." Petitioner states that her child has "not received one day of educational services this year," and further states that "we don't have appropriate services because we don't have any services." Under name of school that student attends, Petitioner writes "None, lives in ABC District."

7. Under remedy, Petitioner states that her child "is a student of ABC not XY and she is not covered by an IEP at XY." She goes on to state that in order for her child "to receive an appropriate education, she must be at the correct school location."

8. Respondent cites in its Objection and Motion that Petitioner's complaints in this present Due Process which it labels as Due Process #4, "regardless of how she restates them, have already been addressed by the Office of Administrative Hearings in Due Process #1 and Due Process #2; have been addressed by the Western District Federal Court and is currently pending in the Fourth Circuit Court of Appeals."

9. Respondent further sets forth that this "placement decision cannot come back to the Office of Administrative Hearings under claim preclusion or *res judicata*. Furthermore, the assignment to XY Elementary School (XY) was made in August 2009, more than one year prior to the filing of Due Process #4. Therefore, even if the Petitioner had a valid argument, the Statute of Limitations bars this action. See N.C.G.S. § 115C-109.6; NC 1504-1.8(a)(2) of the *North Carolina Policies Governing Services for Children with Disabilities*."

### **STANDARD OF REVIEW**

Dismissal is appropriate when the face of the complaint clearly reveals the existence of a meritorious affirmative defense. See *Brooks v. City of Winston-Salem*, 85 F.3d 178, 181 (4<sup>th</sup> Cir. 1996). When reviewing a motion to dismiss, the court assumes the facts alleged in the complaint (Petition) are true, see *McNair v. Lend Lease Trucks, Inc.*, 95 F.3d 325 (4<sup>th</sup> Cir. 1996), and construes the allegations in the light most favorable to the pleader ( in this instance the Petitioner). See *Scheuer v. Rhodes*, 416 U.S. 232 (1974).

**NOW THEREFORE**, based on the above, the Undersigned concludes as follows:

### **CONCLUSIONS OF LAW**

1. The Undersigned finds that the basis of dispute by Petitioner against Respondent, including a description of the nature of the problem(s) and facts relating to the problem(s); as well as the proposed resolution of the problem(s) centers around and focuses on issues and the outcome of a prior due process hearing which is on appeal at the present time. To those issues

the doctrine of *res judicata* applies and cannot be re-heard at the Office of Administrative Hearings in another due process hearing.

2. Further, in accordance with 34 CFR 300.507, a due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law.

3. In accordance with N.C.G.S. § 115C-109.6., “Notwithstanding any other law, the party shall file a petition under subsection (a) of this section that includes the information required under IDEA and that sets forth an alleged violation that occurred not more than one year before the party knew or reasonably should have known about the alleged action that forms the basis of the petition.” Even if *res judicata* should not apply, the Office of Administrative Hearings lacks jurisdiction over issues occurring more than a year prior to filing of the Petition due to the statute of limitations and as such lacks jurisdiction regarding the dispute in the above cited matter.

### **FINAL DECISION**

Based on the foregoing Conclusions of Law, the Undersigned allows Respondent’s Motion to Dismiss. Disposition of this case by dismissal in accord with Chapter 3 of Title 26 of the North Carolina Administrative Code, and N.C. GEN. STAT. § 150B-33 and N.C. GEN. STAT. § 1A-1, Rule 12 of the North Carolina Rules of Civil Procedure, as well as the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, and implementing regulations, 34 C.F.R. Part 300, is proper and lawful. It is hereby **ORDERED** that this matter be **DISMISSED with prejudice**.

### **NOTICE**

The North Carolina Department of Public Instruction has notified the Office of Administrative Hearings that a Final Decision based on an Order of Dismissal is not subject to appeal to the NC Department of Public Instruction.

Pursuant to the provisions of NORTH CAROLINA GENERAL STATUTES Chapter 150B, Article 4, any party wishing to appeal the final decision of the Administrative Law Judge may commence such appeal by filing a Petition for Judicial Review in the Superior Court of Wake County or in the Superior Court of the county in which the party resides. The party seeking review must file the petition within 30 days after being served with a written copy of the Administrative Law Judge’s Decision and Order. N.C. GEN. STAT. § 150B-46 describes the contents of the Petition and requires service of the Petition on all parties. Pursuant to N.C. GEN. STAT. § 150B-47, the Office of Administrative Hearings is required to file the official record in the contested case with the Clerk of Superior Court within 30 days of receipt of the Petition for Judicial Review. Consequently, a copy of the Petition for Judicial Review must be sent to the Office of Administrative Hearings at the time the appeal.

In the alternative, any person aggrieved by the findings and decision of this Final Decision, Order of Dismissal may institute a civil action in the appropriate district court of the United States as provided in Title 20 of the United States Code, Chapter 33, Subchapter II, Section 1415 (20 USC 1415). Procedures and time frames regarding appeal into the appropriate United States district court are in accordance with the aforementioned Code cite and other applicable federal statutes and regulations. A copy of the filing with the federal district court should be sent to the Exceptional Children Division, North Carolina Department of Public Instruction, Raleigh, North Carolina so that the records of this case can be forwarded to the court.

**IT IS SO ORDERED.**

This the 22nd day of November, 2010.

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Augustus B. Elkins II  
Administrative Law Judge